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Martial Law:

WHAT IS IT?

AND

WHO CAN DECLARE IT?

BY

TATLOW JACKSON.

PHILADELPHIA:
JOHN CAMPBELL, BOOKSELLER,
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MARTIAL LAW:

WHAT IS IT, AND WHO CAN DECLARE IT?

The Martial Law, which forms the chief subject of the above queries, is not that code of regulations which controls and directs the actions, trials, and punishments of persons engaged in the military profession, or of the militia, when enrolled under the national banner, and which in England is comprised in the Articles of War, as made under authority delegated to the Royal Executive by Parliament in the Mutiny Act, passed in accordance with usage by the all-potent Parliament from year to year; and which, in the United States, consists of certain acts passed by the Federal Congress under the grants contained in Section 8 of Article I. of the Constitution, to wit: "To make rules for the government of the "land and naval forces," and "to provide for the organizing, "arming, and disciplining the militia, and for governing such part "of them as may be employed in the service of the United States," but *is* that unsettled, dubious and despotic authority which Sir Thomas Smith, in 1642, referred to in his "Commonwealth of England," Book II., Chapter 3, thus: "In war-time and in the "field, the Prince hath also an absolute power, so that his word is "law. He may put to death, or to other bodily punishment, whom "he shall think so to deserve, without process of law, or form of "judgment. This hath been sometimes used within the realm be- "fore any open war in sudden insurrection and rebellion, but that "not allowed of wise and grave men, who in that their judgment "had consideration of the consequence and example, as much as

"of the present necessity, especially when by any means the pun-"ishment might have been done by order of law." And to which Blackstone in his Commentaries refers in Chapter 13 of Book I.: "Martial law, which is built upon no settled principles, but is en-"tirely arbitrary in its decisions, is, as Sir Matthew Hale observes, "in truth and reality, no law, but something indulged rather than "allowed as law." Mr. Tytler, afterwards Lord Woodhousely, on the other hand, in his Essay on Military Law, says: "The prin-"ciples of military law are as certain, determinate, and immuta-"ble, as are the principles of the common and statute law, which "regulate the civil classes of society." But it seems evident that, while Blackstone and Sir Matthew Hale were considering martial law as defined in the latter part of the quotation from Sir Thomas Smith, and which held jurisdiction—if its authority deserve such appellation—over the lives and liberties of persons of the civil state, Mr. Tytler's mind dwelt on military law, as defined in the Articles of War, and controlled by the Mutiny Act annually passed by Parliament.

Martial, and indeed all military laws, in England, were appurtenances of the Feudal system, which was essentially a despotic one, based on the right of the conquest made by William of Normandy, who divided the Kingdom of England into 62,215 Military Fiefs, or portions of land, the holders of which were due military duty to the King, in lieu of rent, and which Fiefs resulted to the Crown on the death, without heirs, of the holders, and were liable to confiscation to the Crown for treason and other crimes.

While this lasted the Government of England was neither more nor less than a military despotism, only controlled and limited by the interested fears of the monarch.

But in the 13th century, the Baronial holders of these Fiefs extracted from the vacillating King John, *Magna Charta*, by which were recovered to the people of England a portion of their natural rights.

Military service still remained, but was at different intervals commuted for annual rents in money, until the military establishment became inadequate to the prosecution of the wars the

nation was almost constantly engaged in. To remedy this, the people, or rather the Barons in their Parliament, enacted statutes by which every subject was held to provide for the maintenance of the King's peace; and it would seem that from that time forward English Kings had not despotic authority, but governed and regulated the army in accordance with the laws and usages of the realm. To carry these into effect, there existed certain military courts, which in the reign of Richard II., having carried to excess their acquiesced in authority, had their powers defined and limited by Act of Parliament. In the reign of Henry II., Parliament made provision for the punishment of deserters, thus displacing the authority of the military courts which henceforth ceased to exercise much power, and, though still existent, were generally disused. During the reign of Mary and Elizabeth, the Executive Power reassumed much of the authority it had ceded, and tyrannical forms of punishment were exercised by force of martial law on civilians as well as on military persons. James I. reigned in a despotic manner, and Charles, his successor, attempting to continue these usurpations, and the Realm suffering great damage from the outrages of the military force, and the billeting of soldiers on the citizens, as well as the issuance of illegal writs to borrow money for the King, Parliament, in the petition of rights, prayed for a revocation and annulment of the commissions which, issuing under the great seal, gave authority to the application of martial law, and likewise for the removal of other grievances. To this the King reluctantly consented.

But not content with this, Parliament, in 1642, in the preamble of a bill "for the better raising and levying of soldiers for the "present defence of the Kingdoms of England and Ireland," declared the King's power to press soldiers to be illegal, unless in the case of sudden invasion, and gave authority to justices, etc., etc., to impress such a number of men as his majesty and the two houses of Parliament would appoint; and now, possessing all the military authority, Parliament assumed command of all fortified places and prepared a bill for transferring the command of the militia to its Commissioners. The refusal of King Charles to as-

sent to this measure precipitated the civil war which devastated the kingdom and abolished the monarchy. During the Protectorate, martial law was exercised to the widest extent over members of the civil state.

On the restoration, the First Parliament abolished the ancient military tenures, and generally upheld the authority of its branch of the Government; but the Second Parliament, by Statutes 13 and 14, Car. 11, declared, "That the sole and supreme power, govern-"ment, command, and disposition of the militia, and of all forces "by sea and land, and of all forts and places of strength is, and "by the laws of England ever was, the undoubted right of his "Majesty and his royal predecessors." However, succeeding Parliaments exhibited a less subservient spirit, and interfered so much with the so-called prerogative of the King that during the latter part of his life he ruled many years without one. James II., continuing the tyranny of his brother, induced the Revolution of 1688, when the Convention Parliament, in the Declaration of Rights accepted by William and Mary of Orange as a condition accompanying the crown, declared, "That the raising and keeping of a "standing army in time of peace without consent of Parliament "is contrary to law."

There was nothing in the Declaration of Rights to annul the Statutes 13 and 14, Car. II., which declared the "government of "the militia and forces was a royal right." However, on the revolt of the Scottish Dunbarton Regiment, in 1689, King William, with politic regard to the growing spirit of freedom, apprised Parliament of the fact, with a view to elicit its assistance. It without delay, passed the Mutiny Act, which has since then been annually re-enacted, and thus legalizes the continuance of the standing army, and provides for its government thus: "That it "shall and may be lawful to and for his Majesty to form, make, "and establish Articles of War, for the better government of his "Majesty's forces, which Articles shall be judicially taken notice "of by all judges and in all courts whatsoever."

By this Act the Articles of War become part and parcel of the statute laws of England, and as such are subject to the supre-

macy of Parliament. And the court martials established under the shadow of the Mutiny Act, and regulated by the Articles of War, are "liable to the controlling authority which the courts of "Westminister Hall have from time to time exercised for the pur- "pose of preventing them from exceeding the jurisdiction given "to them." (Grant *vs.* Sir Charles Gould, 2 Henry Blackstone's Reports.) These courts, therefore, in no way supplant the civil courts, but are, on the contrary, subordinate thereto. Blackstone was in error when he said, "He regretted that the soldier should "be reduced to a state of servitude in the midst of a nation of "freemen;" because, so far as regards martial law as practiced under the authority of the Mutiny Act and its progeny, the Articles of War, the law is written and plain.

But when we come to that kind of martial law which Lord Loughborough refers to, in the case of Grant *vs.* Sir Charles Gould, Court of Common Pleas, Trinity Term, 1792, as follows: "Where martial law is established and prevails in any country, "it is of a totally different nature from that which is inaccurately "called martial law. *Merely*, because the decision is by a court "martial, but which bears no affinity to that which was formerly "attempted to be exercised in this kingdom; *which was contrary "to the Constitution, and which has been for more than a century "totally exploded.* Where martial law prevails, the authority "under which it is exercised, claims a jurisdiction over all *mili- "tary persons*, in all circumstances—even their debts are subject "to enquiry by a military authority; every species of offence "committed by any person who appertains to the army, is tried, "not by a civil judicature, but by the judicature of the regiment "or corps to which he belongs. It extends also to a great variety "of cases, not relating to the discipline of the army, in those "States which subsist by military power. Plots against the "sovereign; intelligence to the enemy, and the like, are all con- "sidered as cases within the cognizance of military authority." This kind of martial law was declared in Ireland during the rebellion of 1798, (prior to the union with Great Britain,) by the Parliament of that kingdom. The statute reads: "That if any

"person, who shall be detained in custody under the powers "created by this Act, shall sue forth a writ of Habeas Corpus, "it shall be good and sufficient return to such writ that the "party suing forth the same is detained by virtue of a warrant "under the hand and seal of some officer or other person duly "authorized by the Chief Governor, or Chief Governors, for the "time being, to issue such warrant under the authority of this "Act."

The passage of this Act shows that the Parliament claimed the right to proclaim martial law. But it further declares, "That "nothing in this Act contained shall be so construed as to take "away, abridge, or diminish the acknowledged prerogative of his "Majesty, for the public safety, to resort to the exercise of martial "law against open enemies or traitors." So that, were we guided in our decision by the wording of this statute, we would incline towards the belief that the right to proclaim martial law over sections of country in insurrection belonged, in Ireland, to both the Legislative and Executive powers. During the rebellion a gentleman, named Grogan, was tried by court martial and executed. The Irish Parliament subsequently enacted a bill of attainder, by which his heirs were deprived the inheritance of property coming through him. They consulted Mr. F. Hargrave, an eminent Barrister in Liverpool, who refers to the case in his Jurisconsult Exercitations, vol. 1, page 399, thus: "But the ques- "tion which forced itself on the author's mind when he was called "upon, professionally, to write an opinion in answer to those who "consulted him for the purpose of seeking a repeal of the Grogan "attainder, was, whether independently of the express warrant "of an act of Parliament, and on the mere ground of prerogative "power, authority could be given against persons taken into cus- "tody for high treason during the heat of the rebellion, to try "them by martial law for their offence, and to punish them, "whether by death or in any other way, at the discretion of the "court martial so trying them. Looking at that question he "could not forbear avowing how his mind was affected. But he "so avowed himself, under a conviction that martial law to that

"extent was not the law of England, *without an express act of* "*Parliament.* He saw the right of putting rebels to death in "battle, while the battle lasted.

"He also saw the right to arrest those found in actual rebellion, "or duly charged with being traitors, and to have them imprisoned "for trial and punishment according to the law of treason. But "he could not see that punishing and trying rebels according to "martial law was, when Mr. Grogan was tried and put to death, "part of the English Law, as it was administered in England, or "even as it was administered in Ireland.

"On the contrary, he saw such a prerogative doctrine to be un- "consonant with several recitals and one enactment in that grand "act of Parliament, the Petition of Rights, in 16th of Charles "the First."

Mr. Hargrave mentions the doctrine of the prerogative to exercise martial law to this extent—as being irreconcilable with opinions declared by Sir Edward Coke, Mr. Noy, Mr. Rolle, Mr. Banks, and Mr. Mason, which opinions can be found in Rushworth, 3d volume.

Mr. Tytler, in referring to this kind of martial law, says: "In "ordinary times the personal liberty of individuals cannot be "abridged at the mere discretion of any magistrate, nor without "the production of the prisoner in court, a certification of the "cause of his detainer, and a decree of the Judge declaring it to "be legal. But in times of turbulence and danger these securities "of personal liberty must yield to the greater object, the security "of the State; and the *Legislature* authorizes, for a time, the sus- "pension of the statute of Habeas Corpus. So likewise the com- "mon and statutory law, which, in ordinary times, is adequate to "the coercion of all offences, may be found, in times of extra- "ordinary turbulence and alarm, utterly inadequate to the repres- "sion of the most dangerous crimes against the State. The slow "and cautious procedure of the King's ordinary courts of justice "keeps no pace with that daring celerity which attends the "operation of rebellion; nor are their regulated forms and pub- "licity of procedure fitted to bring to light the dark designs of a

"conspiracy. In such seasons, therefore, the Constitution pos-
"sesses in itself that remedy which is necessary for its own
'preservation. By the Declaration of Rights, that important
"deed by which the liberties of the subject were ascertained and
"settled at the Revolution, the power of dispensing with the laws,
"or suspending their execution, which in former times was exer-
"cised by the sovereign, is declared to be illegal if without the
"consent of Parliament. Its legality, therefore, with the consent
"of Parliament, is of consequence plainly recognized, and, as
"when emergency requires, the Habeas Corpus Act is for a time
"suspended, by the joint will of the King and the two houses of
"Parliament; so by the same authority, in times of actual rebel-
"lion, martial law, and the mode of summary trials by court
"martial, is enacted for a limited time, either over a part or the
"whole of the Kingdom where such rebellion may exist."

This reasoning is consistent with the principles of the English Constitution, itself a most anomalous and inconsistent system, under which great personal liberty is claimed for the subject, and yet the incongruity of kingly prerogative is admitted. A Constitution vague and indeterminate, consisting of liberties snatched from the hands of despots by Parliaments as opportunity permitted, or granted by the careless good nature of unobservant sovereigns. Thus tedious and weary have been the efforts of Englishmen to recover some few of the natural political rights belonging to all reasoning beings—rights *that are not a mere inheritance in the light of property, but which are essential and vested in each individual*—dependent on the fiat or will of no man; and of which men, in the noble language of the Rhode Island Convention of 1790, "*cannot deprive or divest their posterity.*"

To the wisdom and manhood of the patriots of the last century, Americans owe the definition and enjoyment of these rights.

In the Declaration of Independence, that more than Magna Charta of American liberty, it is declared: "That all men are
"created equal, that they are endowed by their Creator with cer-
"tain unalienable rights, that *among* these are life, liberty, and
"the pursuit of happiness. That to secure these rights, govern-

"ments are instituted among men, deriving their just powers from "the consent of the governed; that whenever any form of govern- "ment becomes destructive of these ends, it is the right of the "people to alter or abolish it, and to institute a new government, "laying its foundation on such principles, and organizing its "powers in such form, as to them shall seem most likely to effect "their safety and happiness." This declares essential rights "endowed by their Creator"—rights that men cannot alienate *even from themselves, no matter what compacts they may make.*

It is true, men may and do make such compacts with penalties for the breach thereof, but the penalty is a consequence of the agreement, and is enforced by human laws, and by no means impugns the natural rights. Unfortunately, the words right and power seem synonimous to uncultivated minds, and the proverb, "Might makes right," is far too widely accepted. In the same way, many persons, in speaking of those who administer the Executive powers of the Federal Union, inaccurately apply the term, "The Government," forgetting Mr. Madison's able remarks over the signature of Helvetius: "The Government unquestion- "ably means, in the United States, the whole Government, not "the *Executive* part, either exclusively or pre-eminently, as it "may do in a monarchy, where the splendor of prerogative "eclipses, and the influence of machinery directs, every other "part of the Government."

Having, in the foregoing pages, given a synopsis of opinions on martial law in England, the greater part of which tends to prove that for its establishment over a section of that country in a state of war or rebellion, an Act of Parliament is requisite, I now attempt by far the more difficult task,—to define martial law in the United States, to show the extent of its jurisdiction, and to determine what authority, if any, has the right to bring into action its despotic power.

In 1774, delegates from most of the British Colonies in North America met in Carpenter's Hall, and after declaring, among other things, that the good people of their respective Colonies, justly alarmed at the arbitrary proceedings of Parliament and Adminis-

tration, have severally elected, constituted and appointed deputies to meet and sit in general Congress in the City of Philadelphia, in order to obtain such establishment as that their religion, laws, and liberties may not be subverted. "Resolved, N. C. D., That "they are entitled to life, liberty, and property, and that they "have never ceded to any sovereign power whatever a right to "dispose of either without their consent." This same Congress issued, also, strong addresses to the people of Great Britain, to the inhabitants of the various Colonies, and to the inhabitants of the Province of Quebec, and also a petition to the King's Most Excellent Majesty, in the last of which they complained, "That the "authority of the Commander-in-Chief, and under him the Briga- "dier General has, in time of peace, been rendered supreme in all "the civil governments in America," but finding all efforts for peaceable redress of their grievances fruitless, they, in 1775, drew up rules and regulations for the government of the army, and in 1776, the Declaration of Independence. This Congress created George Washington Commander-in-Chief of its armies, and carried on the war of Revolution to a successful issue without recurring once to that kind of martial law claimed now as the prerogative of a necessity, of which every commander may constitute himself supreme judge, thus elevating the military authority above the civil; notwithstanding that it was of this, that complaint is made of the British King in the Declaration of Independence, thus: "He "has affected to render the military independent of, and superior "to, the civil power," and that the Constitution of Massachusetts, made in 1780, declares that, "The military power shall always be "held in an exact subordination to the civil authority and be "governed by it," and "No person can in any case be subjected "to martial law or to any penalties or pains by virtue of that "law, except those employed in the army or navy, and except the "militia in actual service, *but by the authority of the Legislature*," and that Maine, Vermont, Pennsylvania, New Jersey, &c., have clauses in their Constitutions of an equally strong and similar nature, and, thirdly, our glorious Federal Constitution in its amendments endeavors particularly to guard individual liberty.

In Article III., it says : "No soldier shall in time of peace, be "quartered in any house without the consent of the owner, *nor in* "*time of war*, but in a manner prescribed by law."

In Article V., "No person shall be held to answer for a capital, "or otherwise infamous crime, unless on a presentment or indict- "ment of a Grand Jury, except in cases arising in the land or "naval forces, or in the militia, when in actual service in time of "war or public danger;" and indeed, in Articles VI., IX., and X., which are too familiar to the public eye to require repetition here.

Nothing in the Constitution would seem to justify the exercise of martial law over citizens of the civil State by any one holding office under the Federal Union. However, a different doctrine has been advanced by many able minds.

In 1815, General Jackson declared martial law in New Orleans, but seems to have been aware that he was transcending his authority as he addressed himself to Major Eaton in terms like these : "I "very well knew the extent of my powers, and that it was far short "of that which necessity and my situation required. I determined, "therefore, to venture boldly forth, and pursue a course corres- "pondent to the difficulties that pressed upon me. I had an "anxious solicitude to wipe off the stigma cast upon my country by "the destruction of the Capitol. If New Orleans were taken, I "well knew that new difficulties would arise, and every effort be "made to retain it; and that if regained, blood and treasure would "be the sacrifice. My determination, therefore, was formed not "to halt at trifles, but to lose the city only at the boldest sacrifice; "and to omit nothing that could insure success. I was well aware "that calculating politicians, ignorant of the difficulties that sur- "rounded me, would condemn my course, but this was not material. "What became of me was of no consequence. If disaster did "come, I expected not to survive it; but if a successful defence "could be made, I felt assured that my country, in the objects at- "tained, would *lose sight of and forget* the means that had been "employed." (See Parton's Life of Jackson, Vol. II., page 60.)

The result proved the correctness of his conclusions. He was reprimanded by the great politician Madison, in a letter written

by the Secretary of the Treasury, April 12, 1815. (See Parton's Life of Jackson, Vol. II., page 320.) He was held up to public obloquy by another great politician, Henry Clay, as a "Military Chieftain," and in 1832, one of the principles of his Administration was, in the State House yard, stated to be, by the present Nestor of the Philadelphia Bar, "The prostration of the influ-"ence of all the Departments of Government, except that which "he fills." Would that this gentleman were now as jealous of Executive usurpation as he was then!

However, the people did generously forgive the means employed, and proved this by the heavy votes they gave for General Jackson, in 1824, 1828, and 1832. The opinion of the celebrated Edward Livingston, at the time Aid-de-Camp to General Jackson, was, that "Martial law can only be justified by the necessity of the case. "The General proclaims it at his risk, and under his responsi-"bility, not only to the Government *but to individuals*, because it "is a measure unknown to the Constitution and laws of the "United States." (See Parton's Life of Jackson, Vol. II., page 59.)

In 1819, Henry Clay said, "He denied that any Commander-"in-Chief in this country had the power of life and death at his "sole discretion." (See Annals XVth. Congress, 2d Sess., Vol. I., page 643.) And Mr. Storrs, in same volume, (on page 751,) says: "Court martials among us are but the mere creatures of positive "law. All their authority is derived from the statute which "creates them; without that they are nothing. They can take "cognizance of no offences whatever, except those specifically "named in the statute," and on page 1020 of same Vol., General William Henry Harrison, of Ohio, says: "In the preceding ar-"gument, I have, I think, established that the military code of "this country consists of the Articles of War established by the "practice of our own armies and those of other civilized nations. "But in searching for precedents from the practice of European "armies, regard must be had to a circumstance which gave to some "commanders there a power *which a General of the United States* "*could never have.* It is the case, when the sovereign personally

"commands his own army, and which gives him, of course, the power "to alter the martial law whenever he chooses, a power which in "the United States can only be exercised by Congress." And on page 1033, the same General said of General Jackson's declaring martial law at New Orleans: "*He well knew that he was "violating the laws of his country*, and that his justification would "depend on his success," and in 1843, the Proteus of Politics, John Quincy Adams, implies the opinion that he was no believer in the doctrine that military commanders can declare martial law, thus: "The question was, whether the House would con- "sent to pass the bill in such a shape as to sanction the principle "that the commander of the army has the power to declare mar- "tial law by his own authority and without instructions from the "Government, and thus take away the privileges, property and "lives of citizens at his pleasure; sanction this, and your children "to the latest day will be subject to martial law at the fiat, not "only of the President, but of a commander of our army." (Congressional Globe, 2d Sess., 27th Congress.)

It is true that the gentleman, only one short year before, said: "You are about passing a grant to refund to General Jackson the "amount of a certain fine imposed upon him by a Judge, under "the laws of the State of Louisiana. You are going to refund "him the money with interest; and this you are going to do, "*because the imposition* of the fine was unjust. And why was it "unjust? Because General Jackson was acting under the laws of "war; and because the moment you place a military commander "in a district which is the theatre of war, the laws of war apply "to that district." However, it is to be supposed that Mr. Adams was converted from the martial law, or despotic theory, by the very able writings of Judge Nicholas, of Kentucky.

Mr. Douglas, Mr. Buchanan, Mr. Berrien, and others, upheld the right of General Jackson to declare martial law, on the plea of the necessity existing—*Salus populi suprema lex.* Mr. Botts, of Virginia, on the other hand, denied "That General Jackson "had the right to declare martial law, and to substitute his own "absolute will for the laws of the country."

General Jackson was greatly pleased with Mr. Douglas' speech, and is said to have used, in his expression of thanks to him, these words: "I knew when I proclaimed martial law, that I was doing "right, but never, until I read your speech, could I have expressed "the reasons which actuated my conduct."

So much for extra judicial opinions; they are, as must be all such where political feuds and alliances influence the speaker, contradictory and unsatisfactory.

Now, we come to the Bench, whence all passion should be banished, and the motto be: "*Fiat justitia, ruat cœlum.*"

In Johnson *vs.* Duncan, et al., page 157, condensed reports Supreme Court of Louisiana, Judge Martin says: "If it be said "that the laws of war, being the laws of the United States, "authorize the proclamation of martial law, *I answer that, in* "*peace or in war, no law can be enacted but by the Legislative* "*power.*"

And Judge Derbigny says: "To have a correct idea of martial "law in a free country, *examples must not be sought in the arbi-* "*trary conduct of absolute Governments.* The monarch, who "unites in his hands all the powers, may delegate to his Generals "an authority unbounded as his own. But in a republic, where "the Constitution has fixed the extent and limits of every branch "of government *in time of war, as well as of peace,* there can "exist nothing vague, uncertain, or arbitrary in the exercise of "any authority."

And Judge Bay, of South Carolina, in Lamb's case, Car., Law Reports, 330, says: "If by martial law is to be understood that "dreadful system, the law of arms, which in former times was "exercised by the King of England and his lieutenants, when his "word was the law, and his will the power by which it was "exercised, *I have no hesitation in saying that such a mon-* "*ster could not exist in this land of liberty and freedom.* The "political atmosphere of America would destroy it in embryo. It "was against such a tyrannical monster that we triumphed in our "revolutionary conflict. Our fathers sealed the conquest by their "blood, and their posterity will never permit it to tarnish our soil

"by its unhallowed feet, or harrow up the feelings of our gallant "sons by its ghastly appearance."

The Judge evidently overrated popular jealousy of Executive usurpation, as was proven by the acquiescence in Jackson's actions of 1815, and is proven by the popular approval of Executive action in Missouri and other portions of our land of liberty, A. D., 1862.

General Halleck, in his very interesting work on International Law, chapter 15, argues, "That the right to declare, apply, and "exercise martial law, is one of the rights of sovereignty; and is "as essential to the existence of a State as is the right to declare "or carry on war."

His chief American authority in regard to this, as well as to the other military doctrines advanced in chapter 15, is Ex-Attorney General Caleb Cushing, whose dicta would probably be entitled to about as much respect as those of our present Attorney General, were he equally consistent; but I know of no one who so practically appreciates the Roman proverb, "*Malum "est consilium quod mutari non potest.*"

General Halleck is now practically proving that the *power* to "declare, apply, and exercise martial law," one of the rights of "sovereignty" lies with the General locally commanding. I cannot deny his power—but even adopting his own hypothesis, I do his authority. If this right be similar and incidental to the right to declare and carry on war, the Constitution has delegated it to Congress in Section 8 of Article I. The Executive power *is not the Government* of the United States; it is the mere arm of it; and as to the sovereignty, it reposes in the peoples of the several States, and the question is whether they have delegated the despotic power, called martial law, to the Federal Government or not, and if they have, to what branch of it? Is it contained in any of the Sections of Article I., which treats of Legislative grants, or of Article II., which treats of Executive, or does it come within the scope of the theory* John Taylor, of Virginia, applied

* See Annals of VIII. Congress, First Session, page 50.

to the purchase of the Colony of Louisiana, in 1803? and which, in this case may be worded thus:

Before the Confederation each State in the Union possessed the right to wage war, and as a contingent necessity appendent thereto, the right to declare and exercise martial law. By granting to the Federal Union the right to declare war, it granted with it the contingent authority; therefore, the State no longer possesses it, "unless actually invaded, or in such imminent danger "as will not admit of delay." (Constitution U. S. Article I., Sec. 10.)

This theory is plausible though not conclusive.

However, as for General Halleck's conclusion, I do not accept it as applicable to the Government of the Federal Union, because Article X. of Amendments to the Constitution, viz: "The powers "not delegated to the United States, by the Constitution, nor "prohibited by it to the States, are reserved to the States respec- "tively, or to the people," proves this Government to be one of limited and enumerated powers, and that, *what is not given is retained*, in which respect it differs essentially from the State Sovereignties, which are presumed to have Legislative powers *only limited by the restrictions contained, first in the Constitution of the Federal Union, second by those in the Constitution of the respective States.*

So, to conclude, I hold,

First.—That the Legislature of any State in the Union can declare martial law, providing such State be "actually invaded, or "in such imminent danger as will not admit of delay," unless the State Constitution contain a restriction upon such power.

Second.—That there is a possibility that the right to declare martial law, is contained in the grants made to Congress in Section 8, of Article I.; and if so, to make martial law effective, it would be requisite to suspend the privilege of the Writ of Habeas Corpus, to have authority to do which the contingencies mentioned in the second clause of Section 9, Article I., must arise.

Third.—That General Jackson's precedent in New Orleans was a bad one, and that neither the Executive, or any of his sub com-

manders, can, by virtue of office, of right declare, apply, or exercise martial law in any State of the Federal Union, and that the so doing is subversive of the principles of our Government as defined in the Declaration of Independence, in the Federal Constitution, and in the bills of rights or Constitutions of the several States.

PHILADELPHIA, *April* 2, 1862.